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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 15

ARTHUR G. BOGARDUS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 9–22) is not reported. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 63–69) are reported in 88 F. (2d) 646.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1937 (R. 72). Petition for a writ of certiorari was filed March 20, 1937, and

was granted April 26, 1937 (R. 73). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the sum of $10,000 paid to the petitioner by the Unopco Corporation in 1931 constituted compensation for personal services or a gift.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 32–33.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10–14) are substantially as follows:

The petitioner was formerly an employee of the Universal Oil Products Company, a South Dakota corporation, organized in 1914, and hereinafter referred to as Universal (R. 10).

At the time of its organization the only asset of Universal was an application for a patent on a process for refining petroleum and manufacturing gasoline. Later it acquired other patents and licensed them to various producers on a royalty basis. From 1922, when it received its first royalty payments of a few thousand dollars, its business improved rapidly, and its royalties had by 1930 become very large. Early in the year 1931 all of its stock was sold to the United Gasoline Corpora-

tion, hereinafter called United, for $25,000,000, under an agreement dated January 2, 1931. (R. 10–11.)

In anticipation of a sale of the stock of Universal, the Unopco Corporation, hereinafter called Unopco, had been organized. As part of the agreement of January 2, 1931, certain "liquid assets," including cash, securities, and accounts receivable, of a value of approximately $4,100,000 were transferred to Unopco before the consummation of the sale of Universal stock. It was provided in the sale agreement that a part of the proceeds of the sale of Universal stock and a certain amount of the assets transferred to Unopco should be held as a "guarantee fund" for payment of Universal's unsettled liabilities. (R. 11, 30.)

Unopco had been engaged in no business activities up to the time of the sale of the Universal stock, and since that time its only business has been the investment and management of the assets acquired from Universal. All of the former stockholders of Universal became stockholders of Unopco, with the same proportionate stockholdings. All the Universal stock was sold to United for cash, and none of the Unopco stockholders thereafter held any stock in Universal or United. Universal continued to carry on the same business after its stock had been acquired by United. (R. 11, 30.)

A few days after the sale of Universal stock the stockholders of Unopco, who were the former

stockholders of Universal, held a meeting at which it was proposed that they show their appreciation for the loyalty and support of some of the employees of Universal by making them a "gift" or "honorarium" (R. 11–12). Such resolution was formally adopted at a meeting of the Board of Directors of Unopco on January 9, 1931, and a similar resolution was adopted by the stockholders on January 10, 1931 (R. 12). The latter resolution was as follows (R. 12):

> *Resolved,* That the following recommendations made by the Board of Directors to the stockholders of this Corporation in the meeting of the Board of Directors held on January 9, 1931, viz.:
>
> That the sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) be appropriated, paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys and experts of Universal Oil Products Company (the corporation of that name referred to in the meeting of this Corporation held on the fifth and sixth days of January, 1931) in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; such sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert as the Board of Directors of this corporation shall determine;

be and the same are hereby in all things approved; and

Resolved further, That this Corporation do appropriate, pay and distribute the said sum of Six Hundred Seven Thousand Five Hundred Dollars ($607,500) as a bonus to sixty-four (64) former and present employees, attorneys and experts of said Universal Oil Products Company; in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company; said sum to be distributed among said sixty-four (64) employees, attorneys and experts in such amounts to each employee, attorney and expert, as the Board of Directors of this Corporation shall determine.

Thereafter, a list of those who were to receive the payments authorized under the resolution was prepared by the officers of Unopco. The payments ranged from $500 to $100,000, and each recipient was or had been an employee, attorney, or expert of Universal, except one who was the sister of an employee who had been killed in an accident. None had ever been employed by Unopco or by any of the former stockholders of Universal. It was stipulated that neither Unopco nor any of its stockholders, nor any of the stockholders of Universal, were under any legal or other obligation to pay any salary, compensation or consideration of any kind to any of the recipients of the distributed amounts. (R. 12–13.)

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In making these payments by checks the president of Unopco advised the recipients that the payments were gifts from the stockholders of the corporation and need not be reported in income tax returns (R. 13, 43–49). Neither Unopco nor Universal nor United, nor any of the stockholders of those companies, ever made or claimed any deduction in their income tax returns for these distributions. On the books of Unopco the payments were charged to surplus account in January, 1931. (R. 13.)

SUMMARY OF ARGUMENT

A. The sole question in this case is whether the payment made to the petitioner in 1931 pursuant to resolutions of the directors and stockholders of Unopco represented compensation for services or a gift to him. The court below affirmed the Board's decision that it was compensation, and three other Circuit Courts of Appeals have rendered the same decision in cases involving other taxpayers who received distributions from Unopco at the same time, under identical circumstances, and whose cases were consolidated with this case before the Board. The question as to whether the payment by Unopco to the petitioner constitutes compensation or a gift cannot, in view of the decision of this Court in *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, certainly be said to be one of fact alone. However, intent or motive is largely controlling and, as four Circuit Courts of Appeals have affirmed the Board

of Tax Appeals in determining the payments to be compensation, of which three of those courts reached that conclusion upon an independent examination of the facts, the concurrent decision of the Board and appellate courts as to the intent of the payer should be highly persuasive upon this Court and should not be disturbed unless clearly inconsistent with the findings of primary facts.

B. The evidence shows that the payments were made as compensation. They were made pursuant to resolutions of the Board of Directors and stockholders of Unopco which contained language clearly indicating an intent to compensate.

C. The fact that the payment in this case was voluntarily made does not prevent its being regarded as compensation. Section 22 (a) of the Revenue Act of 1928, *infra,* provides for the taxation of "compensation for personal service, of whatever kind and in whatever form paid", and the regulations promulgated under that Act, as well as those promulgated under previous and subsequent Acts, recognize that voluntary payments for services are taxable. These regulations have the force and effect of law. Moreover, in cases involving questions substantially the same as the one here involved the courts have repeatedly held that where an employer intends to pay additional compensation for services rendered, the fact that the payment was voluntary does not prevent its being treated as compensation. The few early decisions

to the contrary are against the weight of authority or have been overruled.

D. It is also immaterial that the compensation was paid by Unopco for services rendered directly to Universal. Unopco acquired part of the assets of Universal and had the same stockholders. Both these stockholders and Unopco had derived substantial benefit from the services of the petitioner; they recognized that the compensation hitherto paid him had not been commensurate with the value of his services and made the additional payment to him, not from a motive of affection but from a desire to do justice. Under the decided cases an additional sum paid with the motive of compensating one whose services have benefited the payer, even though indirectly, constitutes compensation and not a gift.

The decision involves no conflict with Section 22 (b) (3), *infra*, providing that the value of property acquired by gift shall not be included in gross income. That section contains no definition of the word "gift", and it cannot be construed independently of Section 22 (a), which provides for the taxation of all compensation. The court below has drawn a logical line of division between the two.

E. The fact that Unopco did not deduct the amount as compensation in its return also is unimportant, especially since the statutory provisions which permit the allowance of deductions for compensation are not identical with those requiring compensation to be reported as income.

ARGUMENT

THE PAYMENT BY UNOPCO TO THE PETITIONER WAS COMPENSATION AND NOT A GIFT, AND WAS TAXABLE UNDER THE STATUTE

A. THOUGH THE QUESTION BE NOT SOLELY ONE OF FACT, INTENT OR MOTIVE IS LARGELY CONTROLLING, AND THE BOARD OF TAX APPEALS AND FOUR CIRCUIT COURTS OF APPEALS CONCUR IN THE CONCLUSION THAT THE PAYMENT WAS INTENDED TO COMPENSATE FOR PAST SERVICES

The sole question in this case is whether the payment made to the petitioner in 1931 pursuant to resolutions of the directors and stockholders of Unopco represented compensation for services or a gift to him. The court below affirmed the Board's determination that it was compensation and taxable income. Three other Circuit Courts of Appeals have rendered the same decision in cases involving other taxpayers who received distributions from Unopco at the same time and under the identical circumstances. *Walker* v. *Commissioner,* 88 F. (2d) 61 (C. C. A. 1st); *Simpkinson* v. *Commissioner,* 89 F. (2d) 397 (C. C. A. 5th); *Hall* v. *Commissioner,* 89 F. (2d) 441 (C. C. A. 4th). To the same effect is *Olsen* v. *Helvering,* 88 F. (2d) 650 (C. C. A. 2d), decided by the same Circuit Court of Appeals as the instant case.[1]

It was the position of the respondent in his brief in opposition, No. 830, October Term, 1936, that

[1] In the *Olsen* case the appellant was the administrator of the deceased distributee of Unopco. The merits of the case were decided on the authority of the instant case, but procedural questions not here involved were also discussed.

the question whether the payments by Unopco to the employees, experts, and attorneys of Universal constituted compensation or gifts was purely one of fact, and that the court below would have been powerless to substitute its own judgment for that of the Board of Tax Appeals had it been so inclined. The brief in opposition was written after the decision of this Court in *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, and before the decision in *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481. In view of the decision in the latter case (p. 491) that the ultimate finding or conclusion of fact that Tex-Penn received cash as well as stock in consideration for its assets was "a conclusion of law or at least a determination of a mixed question of law and fact," we feel unable to press the contention made in the brief in opposition that the question of the nature of the payments must necessarily be viewed as one of fact alone.[2]

[2] It should, however, be noted that most of the courts which have decided substantially similar questions have considered the question to be one of fact depending upon the intent or motive of the payer. See *Fisher* v. *Commissioner*, 59 F. (2d) 192 (C. C. A. 2d); *Schumacher* v. *United States*, 55 F. (2d) 1007 (C. Cl.); *Bass* v. *Hawley*, 62 F. (2d) 721 (C. C. A. 5th); *Botchford* v. *Commissioner*, 81 F. (2d) 914 (C. C. A. 9th); *Levey* v. *Helvering*, 68 F. (2d) 401 (App. D. C.); *Lougee* v. *Commissioner*, 63 F. (2d) 112 (C. C. A. 1st). If the rule of the *Tex-Penn* case should not be taken to be one of general application, and if the present question is viewed as one of fact alone, this Court need examine no other question in the present case. It is not argued (see Br. for Pet. 30–32) there was no substantial evidence to support the determination of the Board.

However, we point out that the court below and the three other Circuit Courts of Appeals which have reviewed the circumstances of the transaction out of which the present question arises have sustained the Board's finding that the payments were intended as compensation and not as gifts; in this case and in the *Hall* and *Simpkinson* cases, *supra*, the courts have reached the same conclusion upon an independent examination of the facts. This conclusion of the Board and of four Circuit Courts of Appeals as to the intent of the payer, even if this narrow question is not viewed as one of fact alone, should be highly persuasive upon this Court and should not be disturbed unless clearly inconsistent with the findings of primary facts.

B. THE EVIDENCE SHOWS THE PAYMENTS WERE MADE AS COMPENSATION

We submit that the stipulated facts and the testimony of the petitioner's witnesses establish that the payments made to the petitioner and others were made with the motive of compensating the individuals receiving them and not as gifts. It is true that it was stipulated that none of the payments made by Unopco to the petitioner and others was made "in payment for or in consideration of any services rendered or ever to be rendered, or of any consideration of any kind or character paid or given, or ever to be paid or given by any of said employees, attorneys or experts * * * to said Unopco Corporation" (R. 40); and that "the pay-

ments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders" (R. 41); but these statements mean merely that no services were directly rendered to Unopco or to its stockholders, and not that they had not received benefits for the services which were directly rendered to another company. With the exception of one payment to the sister of a deceased employee, all the payments were made to former employees of Universal or to attorneys and experts who had rendered services to that company (R. 31–33). The stockholders of Unopco had all been stockholders of Universal (R. 36), and the president of Universal became the president of Unopco (R. 30–31). The payments were made pursuant to resolutions of the Board of Directors and of the stockholders, *supra*, pp. 4–5, which provided for the distribution of certain amounts as a "bonus" and "in recognition of the valuable and loyal services" of the distributees. The latter phrase clearly indicates an intention to compensate, and, as the court below pointed out (R. 67), the use of the word "bonus" is itself significant; neither "bonus" nor "recognition of * * * services" suggests a pure donation. See the *Simpkinson, Walker, Schumacher,*

and *Bass* cases, *supra,* and *Noel* v. *Parrott,* 15 F. (2d) 669 (C. C. A. 4th). In the case of *Bass* v. *Hawley* (C. C. A. 5th), the court said (62 F. (2d) 721, 723):

> That only is a gift which is purely such, not intended as a return of value or made because of any intent to repay another what is his due, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity. Those payments made because of past services, but over and above what was contracted and compellable to be paid, have been called additional compensation and bonuses, and are taxable income to the recipient. * * * The meaning in this connection of additional compensation as a payment for services above what is demandable is clear. Bonus has a parallel meaning: "Something given in addition to what is ordinarily received by or strictly due to the recipient; money given in addition to an agreed compensation." Webster's International Dictionary. Bearing in mind the proper meaning of these terms in looking at the documents that attended these payments we are at once impressed that in no case were they called gifts, but in every instance compensation, additional compensation or bonuses to employees was the term used. Even the card which accompanied each says, "In appreciation", which connotes that something has been appraised and its value is acknowledged.

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In *Noel* v. *Parrott, supra,* holding that a distribution of assets of a corporation to its officers and employees was not a gift, the court said (15 F. (2d) 669, 671):

> If we look to the resolutions of July 14, 1919, it appears that the appropriations from the assets was for distribution to "certain officers and employees of the company", and that the executive committee was authorized to make such distributions as they might deem "wise and proper." This negatives the idea that a gift was intended; for the distribution was to be made to those who had rendered services to the company; i. e., to those from whom the company had received a consideration in the past. It was to be made as the executive committee might deem wise and proper; i. e., in accordance with the interests of the corporation and the deserts of the persons to be benefited by the distribution. The distribution was thus to be in the nature of a bonus, which "is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given." *Kenicott* v. *Wayne County,* 16 Wall. 452, 471 (21 L. Ed. 319); *Payne* v. *United States,* 50 App. D. C. 219, 269 F. 872.

Rogers v. *Hill,* 289 U. S. 582, 591–592, held that the payment to a corporation's officer of percentages of profits under a standing by-law enacted by the stockholders may, where business rapidly increases, become so great that the bonus has no rela-

tion to the value of the services and is a gift, or spoliation of the corporate property. It is cited by petitioner in support of the statement that the word "bonus" in a corporate resolution is not conclusive that a payment to an employee is additional compensation rather than a gift, but the opinion does not, it should be noted, indicate that the word "bonus" does not *ordinarily* imply compensation.

The petitioner relies upon testimony of A. F. Reichmann (R. 30–31) to the effect that the president, H. J. Halle, characterized the payments as gifts. This testimony was admitted over the objection of the attorney for the Commissioner (R. 29), but in any event it is conflicting and tends to show that Mr. Halle labelled the payments as gifts because he assumed that any payments made voluntarily were gifts—an assumption which is erroneous for reasons herein stated—and not because they were not intended as compensation. Thus, this testimony is to the effect that in broaching the subject to the stockholders, Mr. Halle stated that Universal had been phenomenally successful and had profited all of them very largely; that its success was attributable in part to the loyal services of a number of employees; and that it would be a nice and a generous thing for the stockholders to show their appreciation and remember the employees in the form of "a gift or honorarium." The word "honorarium" used by Mr. Halle suggests compensation, as the court below pointed out.

See, also *McDonald* v. *Napier,* 14 Ga. 89, 105; Bouvier's Law Dictionary, Third Revision (1914), Vol. 2, p. 1456; Webster's Unabridged Dictionary. See, *contra, Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), discussed *infra,* p. 20. This evidence shows clearly that the stockholders were making the payments in appreciation for past services and not as pure gratuities. There were also introduced in evidence, over the objection of the attorney for the Commissioner (R. 29), letters of Mr. Halle which characterized the payments as gifts which were not subject to tax. Some of these, however, stated that the payments were made in appreciation of the old relationship, association or support (R. 43–49). In any event, as the Circuit Court of Appeals for the Fifth Circuit stated in the *Simpkinson* case (p. 399), more significance should be attached to the resolutions of the Board of Directors and of the stockholders than to the statements of the president.[3] In that case the court said (89 F. (2d) 397, 399):

> The minutes thus speaking are the best evidence of the corporate act and intention.

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[3] The petitioner cites *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.), as authority for the proposition that the language of the corporate resolution is not controlling. But in that case the court held that the payment constituted compensation, notwithstanding that it was characterized in the resolution as a gift. A corporation may regard any payment in addition to agreed compensation as a gift and incorrectly label it as such, but it would not be likely to label as compensation a payment intended as a gift.

> The president could not alter them by his expressions in carrying out the corporation's directions. It, not he, was making the benefactions. What he said indeed smacks somewhat of an afterthought.

See, also, *Anderson* v. *Commissioner,* 31 B. T..A. 197, affirmed, *per curiam,* 79 F. (2d) 979 (C. C. A. 2d), and *Southern Power & Mfg. Co.* v. *Commissioner,* 82 F. (2d) 104, 105 (C. C. A. 5th).

We submit, therefore, that the evidence sustained the Board's determination that the payments were intended as compensation and not as gifts.

C. THAT THE PAYMENT WAS VOLUNTARY DOES NOT NECESSARILY CONSTITUTE IT A GIFT

The question whether the fact that the payments were voluntary prevents their being regarded as anything other than gifts, notwithstanding that they were intended as compensation, presents no difficulty. The decisions of the courts and the long-continued administrative construction of the taxing statute establish that the voluntary character of the payments is immaterial.

Section 22 (a) of the Revenue Act of 1928 (Appendix, *infra,* p. 32) provides that the gross income shall include income derived from "salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid." Article 52 of Regulations 74, *infra,* p. 32, provides that tips, marriage fees paid to clergymen, and other amounts which are obviously voluntary pay-

ments for services, constitute income to the recipient. Article 128, Regulations 74, *infra*, p. 33, likewise provides that bonuses paid to employees will constitute allowable deductions to the employer when such payments are made in good faith and as additional compensation for services actually rendered by the employees, provided they do not exceed a reasonable compensation for the services rendered. Similar regulations have been in effect under previous and subsequent Revenue Acts. See Articles 32 and 107 of Regulations 45 (1920 Ed.) and Regulations 62; Articles 32 and 108 of Regulations 69; Articles 52 and 128 of Regulations 77; Articles 22 (a)–2 and 23 (a)–7 of Regulations 86. There has been no material change in the statutory provisions with respect to which these regulations have been issued. Hence they have the force and effect of law. *Brewster* v. *Gage*, 280 U. S. 327, 337; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 179–180; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 302–303.

In *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716, the Court held that income taxes paid by an employer for his employee constituted income to the employee, and said (p. 730):

> Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute.

The contention that payments which were wholly voluntary on the part of the employer are not to be treated as compensation to the employee has repeatedly been rejected by other courts. *Fisher* v. *Commissioner,* 59 F. (2d) 192 (C. C. A. 2d); *Levey* v. *Helvering,* 68 F. (2d) 401 (App. D. C.); *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Davis* v. *Commissioner,* 81 F. (2d) 137 (C. C. A. 6th); *Bass* v. *Hawley,* 62 F. (2d) 721 (C. C. A. 5th); and *Schumacher* v. *United States,* 55 F. (2d) 1007 (C. Cls.). See, also, *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2d); *United States* v. *McCormick,* 67 F. (2d) 867 (C. C. A. 2d). The petitioner emphasizes that in this case it was stipulated that the payments were made without "legal or other obligation." (R. 41.) But that is merely stating that they were voluntary. In *Walker* v. *Commissioner* (C. C. A. 5th), one of the companion cases to this case, the court said (88 F. (2d) 61, 62–63):

> In *Old Colony Trust Company* v. *Commissioner,* 279 U. S. 716, 730, 49 S. Ct. 499, 504, 73 L. Ed. 918, there is a dictum to the effect that "the payment for services, even though *entirely voluntary* [is] nevertheless compensation within the statute." [Italics supplied.] Here, according to the resolution, the money "paid and distributed as a bonus to sixty-four (64) former and present employees, attorneys, and experts of Universal" was "in recognition of the valuable and loyal services of said employees, attorneys,

> and experts to said Universal." And if the dictum in the *Old Colony Trust Company* case states the law governing the matter, the payment and distribution, though entirely voluntary, being for "valuable and loyal services" was, nevertheless, compensation within the statute, and, if so, taxable to the recipients. *The phrase "entirely voluntary" payment for services used in that opinion means substantially the same as the stipulation of the parties in this case that "neither Unopco nor any of its stockholders, nor the stockholders of Universal were at any time under any legal or other obligation 'to pay any of said employees, attorneys, or experts, including petitioners, any salary, compensation, or consideration of any kind.'"* [Italics supplied.]

The petitioner cites (Br. 15) *Jones* v. *Commissioner,* 31 F. (2d) 755 (C. C. A. 3d), *Blair* v. *Rosseter,* 33 F. (2d) 286 (C. C. A. 9th), and *Cunningham* v. *Commissioner,* 67 F. (2d) 205 (C. C. A. 3d), as opposed to these contentions. The *Jones* case was decided before, and the *Rosseter* case shortly after, *Old Colony Tr. Co.* v. *Commissioner, supra,* and that decision was not mentioned in the *Cunningham* case, which was decided by the same court as the *Jones* case. It also appears that the Circuit Court of Appeals for the Ninth Circuit, which decided the *Rosseter* case, has more recently decided *Botchford* v. *Commissioner, supra,* which takes a contrary view and may be taken to have overruled

the earlier decision on that point. In any event, these decisions are against the clear weight of authority. It not only has been held that the recipient of a voluntary payment may be taxed on it, but also that the taxpayer making it may claim a deduction if the compensation is reasonable. *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115. See also *Helvering* v. *J. L. Brandeis & Sons*, 75 F. (2d) 487 (C. C. A. 8th); *Liberty Hosiery Mills* v. *Commissioner*, 31 B. T. A. 64; Article 128, Regulations 74, *infra*, p. 33.

The petitioner cites (Br. 24–30) a group of English cases holding that voluntary payments for past services are gifts. We do not think these cases require discussion in view of the many Federal decisions dealing with the question and the many differences between the Federal and the English tax laws. See *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509, 521–522.

The petitioner suggests (Br. 18) that in the cases holding that voluntary payments made by a corporation constituted compensation, one of these three facts appeared: (1) the stockholders had not ratified the payments; (2) there was legal consideration for the payments; or (3) the corporation had deducted the payments in the return. We do not see that any of these factors is necessary for a payment to be compensation. It is true that in some of the cases these facts have been given some weight, but no court has stated that the existence of

one of them was indispensable. None of these three elements was present in *Bass* v. *Hawley*, 62 F. (2d) 721 (C. C. A. 5th), or in *Schumacher* v. *United States*, 55 F. (2d) 1007 (C. Cls.) The distinction which the petitioner seeks to draw between this case and the *Schumacher* and *Bass* cases, on the ground that in the latter cases the stockholders' resolutions did not authorize the payment of gifts while in the instant case they did, is not sound. In the *Schumacher* and *Bass* cases, both of which involved the same facts, the Board of Directors wrote to the stockholders requesting that the Board be authorized "in recognition of the long and faithful service of the officers and employees" to pay them "additional compensation" not in excess of a certain sum. Enclosed with this communication was a letter to be signed by each stockholder and which was signed by each, containing a blanket ratification of what the Board of Directors had proposed in relation to this and other matters and stating that they understood that there were certain unsettled expenses—"bonuses to employees"—to be paid. See the *Schumacher* case, at page 1008. Thus it will be seen that the word "bonuses" was used in the stockholders' authorization. In the instant case the stockholders authorized the payment of a certain amount as a "bonus" "in recognition of valuable and loyal services." The stockholders did not authorize the making of a gift in this case any more than they did in the *Bass* and *Schumacher* cases.

The petitioner apparently concedes that there need be no legal obligation to make the payment but claims that there must be at least a moral obligation to do so, and emphasizes that in this case there was a stipulation (R. 41) that neither a legal nor other obligation existed. But the same thing was true in the *Bass* and *Schumacher* cases. See also *Botchford* v. *Commissioner, supra.*

Thus the fact that the payments to the employees were voluntary, notwithstanding that they were intended as compensation, does not, under the statute involved and the applicable cases, make the payments gifts, nor does it preclude them from being compensation.

D. THAT THE PETITIONER WAS NOT EMPLOYED BY UNOPCO DOES NOT PRECLUDE THE PAYMENT FROM BEING COMPENSATION

It cannot be said as a matter of law that one does not derive any income from services unless he directly renders the services to the payer of the compensation. The statute taxes compensation for personal services of whatever kind and in whatever form paid. Section 22 (a), Revenue Act of 1928, *infra.* The motive to compensate existed in this case, even though Unopco was not directly the beneficiary of the services. Indirectly it and its stockholders received a benefit from the services already rendered to Universal, for the reason that the stockholders had received increased dividends as the result of those services and they had helped to

build up the assets which Unopco acquired. As the Board stated (R. 19), Unopco occupies the same economic position with reference to the recipients as Universal had occupied; it assumed the reason and motive to give bonuses to the former employees of Universal just as it assumed the obligation to pay its unsettled liabilities (R. 19). The fact that the organization of Unopco had been completed and the economic interests of the former stockholders of Universal had been adjusted without providing for these payments does not negative this conclusion. It merely shows that Unopco and its stockholders tardily recognized that everyone except the former employees of Universal had been taken care of and that in justice they were entitled to recognition.

A similar question arose in *Bass* v. *Hawley, supra,* and *Schumacher* v. *United States,* discussed *supra,* p. 22. Those cases both involved the same facts. A holding company had made payments to the employees of its operating company, but both courts held that the payments represented compensation. In *Bass* v. *Hawley* the court said (62 F. (2d) 721, 723):

> Again it is objected that the employer was not the Holding Company or its stockholders, but was the Railroad Company, and that the Railroad Company alone could make additional compensation; that a voluntary payment by any one else is necessarily a gift. The objection would have force where

> the third person had no interest in the employment and no cause to feel obligated to compensate the service. But in this case, although the stockholders authorized the payment, it was made out of funds recently belonging to the Holding Company as the proceeds of the sale of its assets, and the Holding Company was the sole owner of the Railroad Company.

As the court below pointed out, the fact that the recipients of the bonus had not been employees of Unopco or its shareholders does not mean that the shareholders had not benefited from their services. In considering the same issue in *Walker* v. *Commissioner, supra,* the court said (88 F. (2d) 61, 63):

> The petitioners insist that because Unopco was a separate corporation from that of Universal as a matter of law it could not compensate the past employees of Universal for services rendered that company. But the services that were rendered Universal before the sale were rendered to the very same stockholders who voted the additional payments, and the assets of Unopco were a part of the assets of Universal which had been enhanced by such services. We see no reason why the stockholders of Unopco, appreciating the value of those services to them and that without such services Unopco might have had no assets, could not grant compensation therefor. *Bass* v. *Hawley* (C. C. A.) 62 F. (2d) 721.

The *Hall* and *Simpkinson* cases, *supra,* had language to the same effect, the court in the latter case saying (89 F. (2d) 397, 399):

> But it is argued that since Kerr and the other beneficiaries were not and never had been employees of Unopco, or of its stockholders as individuals, the resolutions in rewarding their service to another corporation necessarily authorized only gifts. That contention was made and rejected in the *Bass* and *Schumacher* Cases, *supra.* The same persons in the same proportion owned both Universal Oil Products Company and Unopco. Unopco was in fact the residuum of Universal Oil Products Company, the administrator of its affairs reserved from the sale. This payment from the reserved assets was in recognition of a felt moral obligation of the old business. From Kerr's standpoint he received it for his past services, and it was immaterial whether paid technically by the one corporation or the other.

The case of *Lunsford* v. *Commissioner,* 62 F. (2d) 740 (C. C. A. 6th), relied upon by the petitioner, is not opposed to these decisions. Lunsford, the recipient of the payment in that case, was local manager of some properties of the Fordson Coal Company, which was controlled by the Ford Motor Company, and represented the coal company in negotiations that culminated in the purchase of the properties of the Pond Creek Coal

Company. The Pond Creek Coal Company considered the deal very satisfactory and informed Lunsford that it would like to make him a gift, if this action would meet with the approval of the Ford Motor Company. After obtaining the approval of the latter company, Lunsford accepted the payment. At no time had he been employed by or rendered any services, directly or indirectly, to the Pond Creek Company; in his only contact with that company his interest had been adverse, and the payment was made "in token of friendship and esteem" and not in recognition of past services. The instant case is distinguishable. Here the payment by Unopco was intended as compensation for services which had benefited the stockholders of Unopco when they were stockholders of Universal and which, by assisting Universal in its great success, had contributed to the assets acquired by Unopco. While in this case there was "no legal or other obligation" to make the payment to the petitioner and other employees, and there was no direct consideration to Unopco for the payment, there was a strong inducement to do so, based not upon the fact that the stockholders of Unopco had a personal affection for the recipients who had once been associated with them in business, but upon a recognition that the petitioner and the others had contributed to the financial success of the stockholders and had helped make the creation

of Unopco possible without having received compensation commensurate with the value of this contribution.

The petitioner argues (Br. 14) that, if this reasoning is carried to its logical conclusion it must follow that there never can be a gift by an employer to an employee, for the reason that a payment to an employee must always be made in recognition of services. We do not concede that that is true. We agree with the court below that an employer may make a gift to an employee without meaning it as compensation, although, because of the very nature of the relationship, such cases are rare. Article 52 of Regulations 74, *infra,* recognizes that this is true. The employer may, for example, give an employee money to meet unusual family expenses, without implying or feeling that the services of the employee have not been fully paid for. Such a payment would clearly be a gift. But where the employer recognizes that the agreed compensation paid to the employee was not commensurate with his proven value to the business, we think that an additional sum paid in recognition of that fact is just as clearly compensation.

There is nothing in Section 22 (b)(3), *infra,* p. 32, which is inconsistent with this view. That section merely provides that the value of property acquired by gift, bequest, devise, or inheritance shall not be included in gross income. There is no definition of the word "gift" in this section. Moreover, it grants an exemption from tax and is to be

strictly construed. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *Millsaps College* v. *Jackson*, 275 U. S. 129, 132; *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 187. The provision cannot be construed without regard to other provisions of the Act. *Alexander* v. *Cosden Co.*, 290 U. S. 484, 496; *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126. It is necessary to adopt such a construction of the word "gift" in that section as can be reconciled with the provisions of Section 22 (a) providing for the inclusion in gross income of "compensation for personal service, of whatever kind and in whatever form paid". The problem of drawing a line between a gift and compensation is similar to that involved in *United States* v. *Merriam*, 263 U. S. 179, *Ream* v. *Bowers*, 22 F. (2d) 465 (C. C. A. 2d), and *Rose* v. *Grant*, 39 F. (2d) 338 (C. C. A. 5th), petition for certiorari dismissed, 283 U. S. 867, where the courts found it necessary to distinguish between nontaxable bequests to executors on the one hand and compensation fixed by will for services rendered by the executor on the other. We believe that the court below has laid down a logical rule for distinguishing between gifts and compensation in cases of this character and that no conflict between the two sections of the statute is involved in that rule.

E. THAT UNOPCO DID NOT DEDUCT THE PAYMENT AS BUSINESS EXPENSES DOES NOT CONSTITUTE IT A GIFT

Finally, while the fact that the employer has deducted the payments as compensation has been regarded as being in the nature of an admission that

he intended to pay compensation (see *Fisher* v. *Commissioner, supra; Botchford* v. *Commissioner, supra; Anderson* v. *Commissioner, supra*), the fact that he has not deducted them is not a clear indication to the contrary (*Bass* v. *Hawley, supra; Schumacher* v. *United States, supra; Levy* v. *Helvering, supra*). The test as to what constitutes compensation within the broad language of Section 22 (a), *infra,* does not necessarily determine what constitutes an allowable business expense under Section 23 (a) of the 1928 Act. Apart from the fact that a taxpayer cannot control the application of a Revenue Act by a failure to claim allowable deductions, Section 23 (a) provides only for the deduction of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered." It might be argued against the allowance of such a claim in this case that the recipients of the bonus were not employees of Unopo and hence that no deduction is allowable under Section 23 (a). On the other hand, it might be urged that the claim would be allowable for the reason that the stockholders, who were in reality the employers to whom the past services had been rendered, themselves chose to brush aside the separate corporate entities in recompensing those who had labored for them under a different corporate name. Whatever theory should be adopted as to the deductibility of the amounts by the corporation would have no

bearing on the question whether they constituted income to the recipients. *Simpkinson* v. *Commissioner, supra.*

We think it unnecessary to speculate as to whether the corporation might have been required to pay a tax on these payments under a gift tax statute, for the reason that there was no gift tax in effect during the taxable year here involved; and that in any event the question as to whether a tax should be imposed on the employer under the particular provisions of a gift tax statute would not determine whether the employee could be made subject to an income tax. We know of no case, however, in which a gift tax has been imposed on payments similar to those here involved and the petitioner has cited none.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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OCTOBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * *

Treasury Regulations 74:

ART. 52. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States,

retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States (except pensions exempted by section 22 (b) (6), are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax. But see section 116 (a). See section 31 and articles 311 and 312 for special provisions relative to credit against the tax on account of earned income, and article 643 as to compensation of State officers and employees.

ART. 128. *Bonuses to employees.*—Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and others, which do not have in them the element of compensation or are in excess of reasonable compensation for services, are not deductible from gross income.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1937.

Arthur G. Bogardus, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 8, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The question for decision is whether a sum of money received by petitioner in January, 1931, was "compensation" subject to the federal income tax, or a "gift" exempt therefrom. The commissioner held it to be compensation, constituting part of petitioner's gross income, and declared a deficiency. The Board of Tax Appeals sustained the determination of the commissioner; and the court below, upon review, affirmed the order of the Board. 88 F. (2d) 646.

The decisions of other courts of appeal upon the question under review are conflicting. Upon the one side, the First Circuit (*Walker* v. *Commissioner*, 88 F. (2d) 61, Judge Morton dissenting), the Fourth (*Hall* v. *Commissioner*, 89 F. (2d) 441), and the Fifth (*Simpkinson* v. *Commissioner*, 89 F. (2d) 397) lend definite support to the decision of the court below. Upon the other side, more or less definitely to the contrary, are to be found the decisions of the Third Circuit (*Jones* v. *Commissioner*, 31 F. (2d) 755; *Cunningham* v. *Commissioner*, 67 F. (2d) 205), the Sixth (*Lunsford* v. *Commissioner*, 62 F. (2d) 740), and the Ninth (*Blair* v. *Rosseter*, 33 F. (2d) 286). No useful purpose would be served by reviewing these decisions; and we pass to a consideration of the case before us. The facts follow:

The amount ($10,000) received by petitioner was part of a distribution, aggregating over $600,000 made by the Unopco Corporation at the instance of its stockholders to petitioner and others who had theretofore rendered service as employees or in some other capacity to the Universal Oil Products Company. The Universal company was a corporation organized in 1914. In the beginning,

its only asset was an application for a patent for a process for refining petroleum and manufacturing gasoline. It thereafter acquired other patents, which it licensed to various producers on a royalty basis. Beginning in 1922, its business developed increasingly until by 1930 its royalties amounted to about $9,000,000. In January, 1931, its entire stock was sold to the United Gasoline Corporation for $25,000,000. Prior to the sale, and in contemplation of it, the Unopco Corporation had been organized for the purpose of acquiring, and it did acquire, certain assets of the Universal company of the value of over $4,000,000. Up to the time of this acquisition, the Unopco company had never engaged in any business activities, and thereafter its only business was the investment and management of the assets thus acquired.

All of the former stockholders of the Universal company became stockholders of the Unopco, with the same proportionate holdings. None of them, after the sale of the Universal stock, held any stock in the Universal, or in the United Gasoline Corporation. Under its new ownership, the Universal continued to carry on the same business, retaining a large part of its assets. A few days after the sale of the Universal company's stock, the former stockholders, then stockholders of the Unopco, held a meeting at which it was proposed that they show their appreciation of the loyalty and support of some of the employees of the Universal company by making them a "gift or honorarium". A resolution to that effect was adopted at a meeting of the board of directors of Unopco on January 9, 1931, and by the stockholders the following day. By these resolutions, it was resolved that the sum of $607,500 be appropriated, paid and distributed, as a bonus, to 64 former and present employees, attorneys and experts of Universal Oil Products Company, in recognition of the valuable and loyal services of said employees, attorneys and experts to said Universal Oil Products Company. Payments ranged in amount from $100,000 to $500. Some of the recipients had been out of the employ of the Universal company for many years; and one of them was the sister of an employee killed in an explosion about the year 1919.

At the meeting of the former stockholders of Universal, the former president of that company, then president of the Unopco corporation, said that they had reason to congratulate themselves on their great good fortune in the Universal company, which

started with nothing and had been built up in a phenomenal way; that they had profited largely; that during the years when they were struggling and moving forward they had had the loyal support of a number of employees, and he thought it would be a nice and generous thing to show their appreciation by remembering them in the form of a gift or honorarium. All of the stockholders acquiesced, with the result "that it was understood that we would come forward and make these presents or gifts to the employees that were to be slated for it." The matter had theretofore never been discussed among the old stockholders; and this was the first time it had been brought up for consideration. None of the recipients had ever been employed by Unopco or by any of the former stockholders of the Universal. The parties stipulated that neither the Universal company nor the United "was under any legal or other obligation to pay said employees . . . any additional . . . compensation" other than that which they were paid by the Universal company*; and that neither Unopco nor any of its stockholders, nor any of the stockholders of Universal, was at any time under any legal or other obligation to pay any of said employees, attorneys or experts, including petitioner, any salary, compensation or consideration of any kind.

It was further stipulated—"said payments were not made or intended to be made by said Unopco Corporation or any of its stockholders as payment or compensation for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco Corporation or to any of its stockholders." None of the three corporations or their stockholders ever made or claimed any deduction for federal income-tax purposes in respect of the payments made to the petitioner and the others. Payments were charged, in January, 1931, not to expense but to surplus account on the books of the Unopco company.

The distribution was made to petitioner and the other employees, attorneys and experts by checks, delivered either personally or by mail; and in each instance with the accompanying statement that the moneys represented by such checks were given at the instance of

*The reference to additional compensation paid by the Universal company probably refers to a "bonus", which was clearly compensation, paid by that company to its various employees, some 400 in number, in 1930.

the stockholders of the Unopco Corporation as a gift and gratuity, and were, therefore, not subject to income tax on the part of the recipients.

The Board of Tax Appeals concluded that, from a careful consideration of all the evidence, "the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts." This, as we recently have pointed out, is "a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481, 491; *Helvering* v. *Rankin*, 295 U. S. 123, 131. If the conclusion of the board be regarded as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts. The ultimate determination, therefore, should be overturned, under the doctrine of *Helvering* v. *Rankin*, *supra*, as a matter of law.

The statutory provisions involved are very plain and direct. Section 22 (a) of the applicable revenue act (45 Stat. 791) provides that "gross income", among other things, includes "compensation for personal service, of whatever kind and in whatever form paid." Subdivision (b) (3), immediately following, provides that "the value of property acquired by gift, bequest, devise or inheritance" shall not be included in gross income and shall be exempt from taxation under the income-tax title.

The court below thought that payments such as are here involved "may be at once 'gifts' under § 22, subdivision (b) (3) and 'compensation for personal service' under subdivision (a)." Such a view of the statute is inadmissible and confusing. The statute definitely distinguishes between compensation on the one hand and gifts on the other hand, the former being taxable and the latter free from taxation. The two terms are, and were meant to be, mutually exclusive; and a bestowal of money cannot, under the statute, be both a gift and a payment of compensation. The court below went on to say that decisions like *Old Colony Trust Co.* v. *Commissioner Int. Rev.*, 279 U. S. 716, proved that payments could be both gifts and compensation for personal services. The most casual reading

of that case shows that it is authority for no such doctrine. There, an employer had paid the income tax assessed upon the salary of an employee. The employee had entered upon the discharge of his duties for the year in question under an express agreement to that effect. Quite evidently the payment, so agreed upon in advance, was in consideration of services to be rendered and in no sense a gift. It was a part of the employee's compensation; and the court so held. The idea that it could be a gift in any sense was definitely rejected. We said (p. 730), "Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute."

If the sum of money under consideration was a gift and not compensation, it is exempt from taxation and cannot be made taxable by resort to any form of subclassification. If it be in fact a gift, that is an end of the matter; and inquiry whether it is a gift of one sort or another is irrelevant. This is necessarily true, for since all gifts are made non-taxable, there can be no such thing under the statute as a taxable gift. A *claim* that it is a gift presents the sole and simple question whether its designation as such is genuine or fictitious—that is to say, whether, though *called* a gift, it is in *reality* compensation. To determine that question we turn to the facts, which we have already detailed.

From these we learn that the recipients of the bounty here in question never were employees of the Unopco company, or of any of its stockholders. The Universal company, in whose employ some of the recipients then were, was at the time in no way connected with the Unopco company or any of its stockholders. Some of the recipients had not been in the employ even of the Universal company for many years, and one of them never had been an employee. Neither the Universal company nor any one else was under any obligation, legal or otherwise, to pay any of the recipients, including petitioner, any salary, compensation or consideration of any kind. Such is the express stipulation of the parties. And most significant is the further stipulated fact that the disbursements were *not made or intended to be made* for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco corporation or to any of its stockholders. If the disbursements had been made by

the Universal company, or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there might be ground for the inference that they were payments of additional compensation. Compare *Noel* v. *Parrott*, 15 F. (2d) 669. But such an inference, even upon one of these suppositions, well might strain the realities in the light of the foregoing facts. However that may be, the disbursements here were authorized and the burden borne by persons who were then strangers to the Universal company and its employees, under no obligation, legal or otherwise, to that company or to any of its present or former employees. There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act. The intent is shown by the appeal made at the stockholders' meeting to the effect that it would be a nice and generous thing for these former stockholders of the Universal to show their appreciation of the past loyalty of that company's employees by remembering them in the form of a "gift or honorarium", and by the common understanding then reached that the stockholders would make the suggested "presents or gifts" to these employees. Quite evidently, none of these stockholders had the slightest notion that a *payment* of compensation was to be made.

In sum, then, the case comes to this: The stockholders of the Unopco, having at the time no connection with the Universal company, but rejoicing in the fact of their own great good fortune, and mindful of the former loyal support of a number of employees of the Universal company, and desiring to remember them "in the form of a gift or honorarium", resolved to make through the Unopco company the distribution in question. In doing so, they were moved, as Judge Swan said in his dissenting opinion below, to an act of "spontaneous generosity." We agree with this dissenting opinion of Judge Swan, and the dissenting opinion of Judge Morton in *Walker* v. *Commissioner, supra,* as stating the correct view of the matter.

The only facts which even seem to militate against this view are (1) that the Unopco stockholders had benefited by the former services of the recipients; (2) that the stockholders at their meeting described the payment as a gift or "honorarium"; and (3) that the

resolutions authorized the payment as a "bonus . . . in recognition of the valuable and loyal services" of the employees, etc.

1. Because the Unopco stockholders had benefited by the past services of the recipients, it by no means follows that the distribution in question was not a gratuity. It nowhere appears in the record that full compensation had not been made for these services. There would seem to be a natural inference to the contrary; and the inference is made determinate by the stipulated fact that no one was under any obligation, legal or otherwise (and this would include a moral obligation, however slight) "to pay any additional compensation." There is no ground for saying that the benefit received and the compensation then paid for it were not equivalents.

2. It is said that the word "honorarium" always denotes a compensatory payment. Without agreeing to this broad generalization, it is enough to say that the word is not here used by itself, but coupled with the word "gift" in the phrase "gift or honorarium". Presumptively, the user of the phrase must have known that the word "gift" did not include a compensatory payment, and it is hardly to be supposed that he would consciously nullify that word by the immediate use of another meaning the opposite. The phrase was used in an informal speech at the stockholders' meeting made by the president of the Unopco company. The whole tone of the meeting indicates that the intention was to make gifts in recognition of, not payments for, former services. The conclusion in which the stockholders acquiesced was that they would come forward and make these "presents or gifts" to the employees. In the light of all the circumstances, the absence of moral or other obligation and of any expectation of future benefit, it is reasonable to conclude that the word "honorarium", if the court below correctly defined it, was loosely and inaccurately used.

3. The resolutions, which employ the word "bonus", were adopted to carry into effect the will of the stockholders expressed at their meeting. What occurred at that meeting, as we have already said, indicated their clear intention to make gifts. And since intention must govern, we must consider the word used in the light of the intention. A similar question was before the Court of Appeals for the District of Columbia in *Levey* v. *Helvering*, 68 F. (2d) 401. There, the corporate resolution characterized the payments to be made to reimburse certain officers for income taxes

paid on salaries as "gifts". But the court held this characterization did not settle the matter. It reviewed the facts and reached the conclusion that in the light of them what was intended was not a gift but a bonus, and decided the case in accordance with that view. In other words, the thing that was decided upon and intended, in that case as in this case, was misdescribed in the resolutions to carry the decision and intention into effect. In *Rogers* v. *Hill*, 289 U. S. 582, 591-592, we held, following the dissenting opinion in the court below, that a bonus payment having no relation to the value of services for which it is given is in reality a gift in part. Certainly, where all the facts and circumstances in the case, including the express stipulation of the parties, clearly show the making and the intent to make a gift, it cannot be converted into a payment for services by inaccurately describing it, in the consummating resolutions, as a bonus.

Some stress is laid on the recital to the effect that the bounty is bestowed in recognition of past loyal services. But this recital amounts to nothing more than the acknowledgment of an historic fact as a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient. Compare *Hobart's Admr.* v. *Vail*, 80 Vt. 152.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1937.

Arthur G. Bogardus, Petitioner
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 8, 1937.]

Mr. Justice Brandeis, Mr. Justice Stone, Mr. Justice Cardozo, and Mr. Justice Black, dissenting.

A payment received as compensation for services is taxable as income, though made without consideration, and hence for many purposes a gift. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. To hold, as the prevailing opinion seems to do, that every payment which in any aspect is a gift is perforce not compensation, and hence relieved of any tax, is to work havoc with the law. A large body of decisions, whose provenance is *Old Colony Trust Co.* v. *Commissioner,* would be annulled by such a test. See e. g. *Weagant* v. *Bowers,* 57 F. (2d) 679; *Fisher* v. *Commissioner,* 59 F. (2d) 192; *Bass* v. *Hawley,* 62 F. (2d) 721; *United States* v. *McCormick,* 67 F. (2d) 867; *Botchford* v. *Commissioner,* 81 F. (2d) 914; *Schumacher* v. *United States,* 55 F. (2d) 1007. Cf. *Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115. Their teaching makes it plain that the categories of "gift" and "compensation" are not always mutually exclusive, but at times can overlap. What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so; it bears a tax. Has it been made to show good will, esteem, or kindliness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding

either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery* v. *Commissioner*, 300 U. S. 37; *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481.